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NO 99-1087

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

JOHN LAMBERT, Superintendent,
Washington State Penitentiary,

Petitioner,

v.

BRIAN KEITH LORD,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

31 pp

QUESTION PRESENTED

Did the Ninth Circuit's conclusion that trial counsel were ineffective in failing to investigate and present three independent eyewitnesses, who have consistently stated for the last fourteen years that they saw the victim alive the day after she was supposedly killed, where the date and time of death were critical to the state's primarily circumstantial evidence case, contradict the pre-existing Supreme Court case of Strickland v. Washington, 466 U.S. 668 (1984), or other pre-AEDPA law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF THE CASE 1

Procedural Background 1

Factual Overview. 2

REASONS WHY THE PETITION SHOULD BE DENIED 4

1. *There is no conflict between Lord and Strickland; both acknowledge the fact-bound nature of the ineffective assistance inquiry, the inappropriateness of per se rules of attorney conduct, the need for investigation before strategic decisionmaking and the importance of evaluating the totality of the circumstances.* . . . 5

2. *There is no conflict between the decision below and other Circuit Courts' Strickland decisions; none of them endorse a per se rule of reversal for counsel's failure to interview witnesses and none of them endorse a per se rule of affirmance where counsel has interviewed a witness* 11

3. *The impact of the opinion below is quite limited, because it was a fact-bound decision in a pre-AEDPA case* 19

4. *Petitioners misstate certain facts relevant to this Court's exercise of certiorari jurisdiction.* . . 19

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987), cert. denied, 485 U.S. 970 (1988) 19

Brecht v. Abrahamson, 507 U.S. 619 (1993) 11

Chambers v. Armontrout, 907 F.2d 825 (8th Cir.), cert. denied, 498 U.S. 950 (1990) 18, 19

Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986) 18, 19

Griffin v. Warden, 970 F.2d 1355 (4th Cir. 1992) 19

Grooms v. Solem, 923 F.2d 88 (8th Cir. 1991) 19

Hill v. Lockhart, 28 F.3d 832 (8th Cir. 1994), cert. denied, 513 U.S. 1102 11

Huffington v. Nuth, 140 F.3d 572 (4th Cir.), cert. denied, 525 U.S. 981 (1998) 18

Kyles v. Whitley, 514 U.S. 419 (1995) 11

Lawrence v. Armontrout, 900 F.2d 127 (8th Cir. 1990) 19

Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987), cert. denied, 488 U.S. 829 (1988) 14

Lewis v. Mazurkiewicz, 915 F.2d 106 (3rd Cir. 1990) 15, 16

Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985) . . . 19, 21, 24

O'Neal v. McAninch, 513 U.S. 432 (1995) 10

Plant v. Wurick, 636 F.2d 188 (8th Cir. 1980) 17

Ray v. Rose, 535 F.2d 966 (6th Cir.), cert. denied, 429 U.S. 1026 (1976) 16

Sanders v. Trickey, 875 F.2d 205 (8th Cir.), cert. denied, 493 U.S. 898 (1989) 17

Strickland v. Washington, 466 U.S. 668 (1984) . . . . . passim

Thomas v. Wyrick, 535 F.2d 407 (8th Cir.), cert. denied, 429 U.S. 868 (1976) 17

United States v. Weaver, 882 F.2d 1128 (7th Cir.), cert. denied, 493 U.S. 968 (1989) 13

Walls v. Bowersox, 151 F.3d 827 (8th Cir. 1998), cert. denied, 119 S.Ct. 1468 (1999) 13

Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995) 12

Williams v. Head, 185 F.3d 1223 (11th Cir. 1999) 12

Wing v. Sargent, 940 F.2d 1189 (8th Cir. 1991) 17

STATEMENT OF THE CASE

Procedural Background. Mr. Lord was charged with felony murder and aggravated first degree murder. He was convicted as charged, after more than two months of trial; the jury returned "yes" verdicts to three of five charged aggravating factors. After a short penalty phase, the jury sentenced Lord to death.

The Washington Supreme Court affirmed, 6 to 3. Then-Chief Judge Dore's dissenting opinion states that in Lord's case, "For the first time in the ten years I have been on the Supreme Court I now dissent on a capital punishment case... because I feel the defendant did not have a fair trial." App. 275a-276a.

Following denial of state post-conviction relief, and before enactment of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Mr. Lord's first and only habeas petition was timely filed. The district court granted an evidentiary hearing on claims concerning the credentials and credibility of state criminalist-witness Don Phillips; on the Washington State Patrol Internal Affairs investigation of Phillips' conduct on Lord's case; on ineffective assistance of counsel issues; and on problems with the testimony of two jailhouse informants. That court issued the writ in part, because of a penalty phase error. The state appealed the issuance of the writ on the penalty phase issue; Mr. Lord cross-appealed the denial of the writ on guilt phase issues, including the ineffective assistance of counsel issue before this Court.

The Ninth Circuit reversed the denial of the writ as to the guilt phase and dismissed the state's appeal of the grant of the writ on a penalty phase issue as moot. The state's petition for rehearing was denied; its suggestion for rehearing en banc was denied with no judge requesting a vote on the en banc call. App. 32a.

Factual Overview. The state's Petition introduces the factual background of this case by referring to portions of the state Supreme Court's view of the evidence. That court's decision on direct appeal, however, was based on incomplete data. The state at that time had still failed to disclose exculpatory information bearing on the veracity and reliability of the state's key forensic scientist, Don Phillips, who testified that he identified blood on the hammer that the state presented as the murder weapon and in the garage-workshop that the state identified as the murder scene -- information which was contained within the State Patrol's Internal Affairs files, some of which was personally known by the Prosecutor who tried this case. That information was located by post-conviction counsel and presented at the evidentiary hearing in district court. The district court was therefore able to present a more complete picture of facts relevant to the crime, the investigation, and the scientific evidence presented at trial.

The district court summarized Phillips' role in applying leuco-malachite green as a presumptive test for blood at the suspected crime scene in the Kirk Lord workshop on September 29, 1986, and in concluding that a hammer in that workshop and an area

on the floor of that workshop tested positive for blood. It then explained the Internal Affairs investigation concerning Phillips' test, only the barest outlines of which were discovered by the defense on their own, mid-trial; we highlight the portion that remained unknown to trial counsel at all times:

> At the evidentiary hearing before this court, *Sweeney testified that Phillips told him three different versions of how he had tested the hammer, all of them false.*

Order, P. 6, n. 3; CR:438 (App 39a).

> After talking with [criminalist] Nolan on October 23, 1986 and being informed that Nolan had conducted an exhaustive second examination of the hammer, [supervisor] *Sweeney himself examined the hammer for any indication of bodily fluids. He found none. He also asked another criminalist in the office, Chesterene Cwiklik, to examine the hammer for evidence of leuco-malachite green. Her examination revealed no proof of its presence on the hammer.*
>
> On November 3, 1986, Phillips submitted a written report .... This report was false in that it indicated he had used the drop method of testing the hammer rather than the spray method. Upon Sweeney's discovery that the report was false, an internal investigation of Phillips ensued which was conducted by the WSP Internal Affairs Section. Phillips resigned from his position effective December 26, 1986.
>
> Defense counsel only became aware of the internal investigation after Phillips' deposition when one of the Kitsap County detectives working on the case commented in a casual conversation with defense counsel in the hallway outside the courtroom that he had been interviewed during the investigation. On June 1, 1986, defense counsel brought the issue before the court and asked for discovery. The prosecutor denied having any reports or discoverable information on the subject.

* * *

> ... In an effort to speed the process, the trial judge agreed to act as an intermediary by contacting the attorney for the WSP and asking for the release of any relevant documents regarding the internal investigation of Phillips. On June 4, 1986, she indicated to counsel that she had received several documents, had reviewed them in camera and would release them to counsel ....
>
> ... *The judge indicated to defense counsel and they accepted her assurance that they had received all relevant documents.*
>
> *In fact, not all of the available, relevant information associated with the internal investigation was provided to defense counsel. An inquiry several years later by Lord's current counsel ... revealed several reports and other documents directly pertaining to Phillips credibility and qualifications as a criminalist as well as findings about the lack of trace evidence on the hammer which were not disclosed to defense counsel at trial.*

App 40a-43a.

Other information not before the state Supreme Court was the exculpatory testimony of the three young men *who stated then, and continue to state now*, that they saw the victim alive the day *after* Lord was supposed to have killed her. Given the narrow time period during which the murder could have been accomplished by Lord at the identified crime scene -- less than an hour on the evening of September 16, 1986, while the victim was unaccounted for and before the Kirk Lord family returned from out of state -- a 24-hour change in the time of death was critical, exculpatory information.

REASONS WHY THE PETITION SHOULD BE DENIED

Respondents respectfully request that this Court deny the petition for writ of certiorari. Section 1. There is no conflict between Lord and Strickland; both acknowledge the fact-bound nature of the ineffective assistance inquiry, the inappropriateness of per

se rules of attorney conduct, the need for investigation before strategic decisionmaking and the importance of evaluating the totality of the circumstances. Section 1. There is no conflict between the decision below and the other Circuit Courts' Strickland decisions, either; none of them endorse a per se rule of reversal for counsel's failure to interview particular witnesses and none of them endorse a per se rule of affirmance where counsel has interviewed a witness. Section 2. Further, the impact of the opinion below is quite limited because it was a fact-bound decision in a pre-AEDPA case. Section 3. Finally, petitioners misstate certain facts relevant to this Court's exercise of certiorari jurisdiction. Section 4.

1. *There is no conflict between Lord and Strickland; both acknowledge the fact-bound nature of the ineffective assistance inquiry, the inappropriateness of per se rules of attorney conduct, the need for investigation before strategic decisionmaking and the importance of evaluating the totality of the circumstances.*

The state says the Ninth Circuit's Lord decision is based on an erroneous per se rule requiring relief whenever defense counsel fail to interview certain witnesses. Its petition calls for certiorari because, it claims, the Ninth Circuit's purported categorical decision was wrong; in fact, the state continues, Strickland categorically precludes relief where defense trial counsel fail to interview alibi witnesses whose testimony is consistent with the defense theory and inconsistent with the state's theory, and then fails to call them at trial.

The petition's characterizations of the Lord holding and the Strickland holding are both wrong. The Lord case established no new rule *requiring* a finding of deficient performance when trial counsel fail to interview certain witnesses personally; it explicitly rejected such a categorical rule.[1] The Lord case established no new rule detracting from the strategic nature of the decision to call a witness or not; it explicitly acknowledged the "professional judgment" involved in such a decision.[2]

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[1]The Ninth Circuit's statement about whether it was creating a categorical rule or not stated, in full:

> Counsel is not obligated to interview every witness personally in order to be adjudged to have performed effectively .... However, where (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness. The reason for this is simple: A lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor -- factors we are not in a position to second-guess.

App. 27a, n. 8.

[2]The Ninth Circuit's full statement on this point is:

> We would nevertheless be inclined to defer to counsel's judgment if they had made the decision not to present the three witnesses after interviewing them in person. Few decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial. A witness's testimony consists not only of the words he speaks or the story he tells, but of his demeanor and reputation. A witness who appears shifty or biased and testifies to X may persuade the jury that not-X is true, and along the way cast doubt on every other piece of evidence proffered by the lawyer who puts him on the stand. But counsel cannot make such judgments about a witness without looking him in the eye and hearing he tell his story.

App. 27a.

On the other hand, Strickland adopted no categorical rule precluding a finding of deficient performance where attorneys fail to interview and call particular witnesses. Strickland started from the premise that the more investigation a trial lawyer does before making a strategic choice, the more deference trial counsel's strategic choice deserves. The Ninth Circuit said exactly the same thing, even quoting Strickland.[3] The notion that fuller attorney investigation, including interviews, can lead to a more informed determination about witness credibility, stated in Lord, is thus simply a subset of the general Strickland rule that fuller investigation can lead to more informed strategic decisions of all sorts.

So who is endorsing the creation of categorical, per se, rules in the ineffective assistance area? Not the Ninth Circuit. It began with a detailed analysis of the strengths and weaknesses of the state's largely circumstantial evidence case, App. 9a-13a; it continued with a review of the theory of the defense case and an analysis of whether the alibi eyewitnesses supported or undermined that case, App. 13a-14a; it then went into a detailed description of every statement that the three neutral alibi eyewitnesses ever gave to law enforcement or defense investigators, pointing out the consistency of the young men's descriptions of the subject, time and date of the sightings, and the minor inconsistencies which

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[3]As the Ninth Circuit in Lord explicitly stated, citing Strickland: "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable, professional judgments support the limitations on investigation."

tended to show that there had been no collusion in the stories, App. 14a-22a; it canvassed the record of trial counsel's testimony for any valid reason for failing to interview or call these witnesses and found that defense counsel conceded that the witnesses supported the defense theory, acknowledged that the witnesses contradicted the state's case in a critical respect, had no belief that the witnesses were biased, and made the decision not to call them based solely on *a credibility determination that no one who ever spoke directly to the witnesses ever made.*[4] App. 22a-24a. The Ninth Circuit made a contextual holding, not a categorical holding, that given these circumstances, trial counsel's performance was deficient. It is the state that is essentially seeking a departure from such a detailed, contextual, fact-specific analysis, by claiming that it is *always* permissible for trial counsel to avoid personal interviews with potential witnesses.

Further, the Ninth Circuit explicitly stated that it was *not* creating any rule that counsel must personally interview any, or all, or even specific, types of witnesses; it simply reiterated the axiom endorsed by Strickland that the more thorough the investigation, the more deference to strategic decisions of counsel

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[4]While the investigators' reports pointed out minor discrepancies in the witnesses' descriptions, neither the law enforcement reports nor the defense investigator reports ever gave any conclusion or any basis for a conclusion that the boys were lying, drunk, high, biased, or in any other way unable to perceive or relate accurately. The only ones in this case to make any adverse credibility determination about the boys were the people who never met them.

is warranted, and the less thorough the investigation, the less deference to strategic decisions of counsel is warranted:

> Counsel is not obligated to interview every witness personally in order to be adjudged to have performed effectively.... However, where (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness. The reason for this is simple: A lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor -- factors we are not in a position to second-guess.

App. 27a.

The state also contends that the Ninth Circuit failed to apply Strickland's "reasonable probability" of a different outcome standard in evaluating whether trial counsel's deficient performance caused prejudice. The state contends that the Ninth Circuit found that a mere possibility of a different outcome sufficed. Petition, p. 17.

The state is splitting hairs. When it came to characterizing how much, and how persuasive, the omitted testimony would have been, the Ninth Circuit stated in the words of Strickland that it would have been enough not just for the possibility of a different outcome, but to "undermine confidence in the outcome."[5] This "undermine confidence in the outcome" standard is taken verbatim

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[5]The Ninth Circuit's complete holding on this point is:

> We cannot say that the government's case was so strong that the testimony of these three witnesses could not have raised a reasonable doubt in the minds of the jurors. Rather, we find the possibility that their testimony would have led to Lord's acquittal to be "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

App. 28a.

from Strickland, 466 U.S. at 694. The possibility or "probability" standard is taken from Strickland, also, which held that even a "more likely than not altered the outcome" standard was too *high* a burden for defendants to shoulder in this context. Id., 466 U.S. at 693. Strickland explicitly defines the sort of "probability" that counts as a "probability sufficient to undermine confidence in the outcome," id. at 694, and that is precisely the standard and the language used in Lord.

Further, the state faults the Ninth Circuit for applying the burden of proof adopted in O'Neal v. McAninch, 513 U.S. 432, 445 (1995), to this Strickland claim, arguing that this relieved Lord of the burden of proving prejudice. Petition, pp. 17-18.[6] Actually, the Ninth Circuit ruled that the error was prejudicial under both standards, so its use of two prejudice hurdles, O'Neal and Strickland, rather than one, was not relieving Mr. Lord of proving anything. Further, after Strickland prejudice is found, there is no additional finding of prejudice required to prove a Strickland claim on habeas: Strickland itself was a habeas case,

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[6]The Ninth Circuit's full statement on this point is:

> ... If Holden, Huff and Ayres had testified, the State might still have won a conviction by exploiting the inconsistencies in their accounts or convincing the jury that it was Tracy's sister they saw that day. That, however, would be a very different case. As it is, we find ourselves "in grave doubt as to the harmlessness of an error that affects substantial rights," and must conclude that counsel's omission of this evidence prejudiced Lord's defense. O'Neal v. McAninch, 513 U.S. 432 (1995).

App. 28a.

and Strickland held that its performance and prejudice tests sufficed, without further proof of harm. Id., 466 U.S. at 697-98. Thus, no additional prejudice inquiry -- such as that mandated by Brecht v. Abrahamson, 507 U.S. 619 (1993) -- is undertaken in a Strickland habeas case. O'Neal v. McAninch, cited by the Ninth Circuit, involves the application of Brecht in a particular context. There was no need to apply Brecht's prejudice standard to Lord's habeas claim at all, though, since Strickland's prejudice standard was satisfied[7]; hence there was no need to apply O'Neal's development of Brecht's prejudice standard, either. Thus, if the Ninth Circuit made any error, it was in forcing Lord to prove too much prejudice, under Brecht (O'Neal) as well as Strickland, rather than too little.

2. *There is no conflict between the decision below and other Circuit Courts' Strickland decisions; none of them endorse a per se rule of reversal for counsel's failure to interview witnesses and none of them endorse a per se rule of affirmance where counsel has interviewed a witness.*

As discussed above, the state's characterization of the Ninth Circuit's decision as one based on a new rule requiring defense trial counsel to interview personally all witnesses, or certain witnesses, or particular categories of witnesses, is wrong. Yet the state depends on this error; that is the only way that the state can manufacture the purported conflict between the holding in

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[7]See Kyles v. Whitley, 514 U.S. 419, 436 & n.9 (1995); Hill v. Lockhart, 28 F.3d 832, 839 (8th Cir. 1994), cert. denied, 513 U.S. 1102 (1995).

Mr. Lord's case and the sister circuit decisions rejecting per se rules regarding ineffective assistance.

Thus, the petition argues that Lord conflicts with Williams v. Head, 185 F.3d 1223, 1237 (11th Cir. 1999), which supposedly rejected "a per se rule that required an attorney to personally interview potential defense witnesses." Petition, p. 11. Actually, no party advanced such a per se rule in the Eleventh Circuit case; it is a routine holding the counsel was not deficient for failing to interview a death-sentenced defendant's father for possible mitigation evidence, were the defendant had had almost no contact with the father and there was no other indication that he could supply any useful information. In Lord, of course, the witnesses provided the complete defense of alibi, and prior interview reports clearly highlighted their importance. Thus, Williams v. Head is completely consistent with Lord.

The petition then implies that Lord conflicts with the Seventh, Eighth and Eleventh Circuits, because they "agree the decision not to call a witness is the epitome of a strategic decision that the courts will seldom second guess." Petition, p. 10, n.3. In support of this assertion, the petition first cites Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) (1995). This case, like Lord, viewed the totality of the circumstances. Then it addressed whether counsel's failure to re-call witnesses with information about the death-sentenced defendant's mental illness in the penalty phase, when such evidence had already been presented at the guilt phase, was error. The fact

that trial counsel was not ineffective in not re-calling these witnesses, after having fully investigated, prepared, and presented their testimony at trial, does not conflict with Lord -- because in Lord, trial counsel never did any such presentation of the necessary witness testimony.

The petition next cites Walls v. Bowersox, 151 F.3d 827, 834 (8th Cir. 1998), cert. denied, 119 S.Ct. 1468 (1999), in support of the claim that Lord conflicts with the sister circuits' holdings granting complete deference to counsel's decision not to call witnesses. That case held that trial counsel's failure to call family members to present mitigation evidence at the penalty phase did not amount to ineffective assistance, since "the defense team made an extensive effort to investigate Walls' family background and to secure the family's testimony at trial," id. at 833-34, the efforts were made by not just a social worker *but also by the trial lawyers*, id. & n.4, but "the family steadfastly refused to testify." No such extensive investigation, including investigation by counsel, complete with attempts to secure testimony, occurred with the Lord alibi witnesses. Thus, Walls v. Bowersox is also consistent with Lord.

United States v. Weaver, 882 F.2d 1128, 1139 (7th Cir.), cert. denied, 493 U.S. 968 (1989), also cited by the state for the notion that no Strickland claim can ever lie for failure to call witnesses, dealt with trial counsel's failure to call witnesses. But there was no allegation in Weaver that trial counsel failed to interview the witnesses. Instead, trial counsel learned that the

witnesses might be helpful in providing impeachment evidence but would hurt by undermining the key defense of coercion. In Lord, in contrast, defense counsel admitted that the alibi witnesses' testimony *supported* the defense theory, contradicted the state's theory, and opened the door to nothing damaging. App. 22a, 24a. Thus, only the facts of Lord and Weaver differ -- not the holdings.

The final case cited by the state in support of its claim that Lord conflicts with the other circuits in its treatment of trial counsel's decision not to call witnesses is Lewis v. Lane, 832 F.2d 1446, 1447 (7th Cir. 1987), cert. denied, 488 U.S. 829 (1988). It is true that the court in Lewis v. Lane found no ineffectiveness where trial counsel failed to call "alibi" witnesses. But there was no problem with investigation there: the witnesses were "present at trial"; the trial *attorneys* made several attempts to interview them personally pre-trial; after the witnesses failed to appear for appointments they retained *another lawyer who successfully obtained personal interviews*; and that *lawyer* told trial counsel "that it was her opinion that the witnesses were not credible and that they would lie on the stand..." Id. In Lord, in contrast, no attorney ever even tried to interview the witnesses; no attorney made a professional conclusion about witness credibility based on personal contact; the witnesses never avoided or missed appointments; and no investigator, defense or police, who had personal contact with the alibi witnesses, ever said that they were lying, unbelievable, or biased. Thus, there is no conflict between Lewis v. Lane and Lord, either. If there had been attorney

interviews of the alibi witnesses in Lord; if there had been attorney conclusions that the alibi witnesses lacked credibility and would exude bias in Lord; if there and been support at any level for a finding that the neutral, independent, eyewitnesses in Lord who had given their immediate sightings to law enforcement and defense alike were unbelievable or biased; then this would be a very different case.

The petition then claims that Lord conflicts with the Eleventh Circuit's deference to trial counsel's decision to refrain from investigating, in an apparent attempt to convince this Court that all limits on investigation are defensible under Strickland. Petition, p. 11. Strickland, however, explicitly recognized the duty to investigate. Id., 466 U.S. 668, 689-90.

The petition further implies that Lord conflicts with the Third Circuit, which has a rule of deference to trial counsel's decisions about whether to interview witnesses personally and whether to call them to testify. Petition, p. 11 (citing Lewis v. Mazurkiewicz, 915 F.2d 106, 113 (3rd Cir. 1990)). Lewis v. Mazurkiewicz, however, involved trial counsel's decision not to interview a self-defense witness because, based on the defendant's description of the events, the deadly force the defendant used, and the conflicts between the physical evidence and the uncalled witness' proposed testimony, no self-defense theory could succeed. In fact, the Third Circuit in Lewis v. Mazurkiewicz distinguished between cases in which the proposed witness testimony, as outlined to trial counsel, provides little support for a possible defense

and cases (like Lord) in which proposed witness testimony would support a viable defense completely consistent with the defense theory. It held that Lewis v. Mazurkiewicz fell into the first category, because the absent witness' testimony did not support a self-defense theory. The Third Circuit explicitly noted, however, that it *had granted relief under Strickland in a case that fell into the second category*, i.e., where "defense counsel made no effort to locate or interview witnesses who could have supported a potentially effective defense [self-defense] that was unsuccessfully advanced at trial." Id. at 114. The Lord case also falls into that second category. The Lord decision is completely consistent with the Third Circuit's case-by-case approach to whether counsel's failure to interview witnesses rises to the level of ineffective assistance.

The petition then contends that Lord conflicts with the holding of Ray v. Rose, 535 F.2d 966, 975 (6th Cir.), cert. denied, 429 U.S. 1026 (1976), that there is no right to independent investigation by trial counsel; trial counsel can rely on the prior *attorney's* work. Indeed, this pre-Strickland case did so hold. But the prior attorney in Lord had not yet interviewed the alibi witnesses before he had to withdraw, in the pre-trial process, due to a conflict. Thus, his limited work at the charging stages of this lengthy case and his lack of contact with the alibi witnesses provided an incomplete basis for later trial counsel to make such a trial strategy decision.

The petition further argues that several circuits follow the rule that "[o]nly rarely" does counsel's failure to interview potential witnesses arise to the level of ineffective assistance. The cases (half of which pre-date Strickland) are more accurately described as endorsing a case-by-case approach to whether trial counsel's decision to decline to interview witnesses, given proper deference, will constitute deficient performance.[8] Still, either characterization underscores the fact that there are those cases -- like Lord -- where failure to interview particular witnesses will constitute deficient performance. The decisions cited by the Petition in support of this point thus endorse the Lord case-by-case approach, rather than contradicting it.

None of the cases contained in the state's petition establish a per se rule precluding relief for ineffective assistance based on

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[8]The petition generally cites, in support of this notion, Plant v. Wurick, 636 F.2d 188, 189 (8th Cir. 1980); Wing v. Sargent, 940 F.2d 1189, 1190 (8th Cir. 1991); Thomas v. Wyrick, 535 F.2d 407, 413 n.7 (8th Cir.), cert. denied, 429 U.S. 868 (1976); Sanders v. Trickey, 875 F.2d 205 (8th Cir.), cert. denied, 493 U.S. 898 (1989). In Sanders v. Trickey, the trial lawyer *did* interview the witness who was not called to testify. It then cites and distinguishes three Eighth Circuit cases in which *failure to interview witnesses was found to constitute deficient performance.* Plant v. Wyrick, though declining to find deficient performance on the facts before it, explicitly cited three prior circuit decisions in which the same court *had* found ineffective assistance of counsel due to failure to interview witnesses. In Wing v. Sargent, the trial lawyer decided to call two witnesses, whom he never interviewed, who supposedly would have said the defendant did not do the crime. But trial counsel's decision was reasonable because those witness' testimony, even if credible, would have thwarted his trial strategy, alerting the judge to the need for an instruction that he did not want given. In Lord, of course, the witnesses' testimony, if believed, would have only bolstered the defense theory of the case. And Thomas v. Wyrick actually held that counsel's failure to interview witnesses did constitute ineffective assistance!

failure to investigate, interview and call particular witnesses.[9] Nor does Lord. None of these cases establish a per se rule compelling relief for ineffective assistance based on failure to investigate and call particular witnesses. Nor does Lord. The point emphasized by all these cases, and Lord, is context.

In fact, decisions of the sister circuits affirmatively *support* the notion that a decision not to call an exculpatory witness that is based even in part on the witness' purported lack of credibility is entitled to less deference where trial counsel never got to evaluate that witness' credibility with an interview.[10] Similarly, decisions of the sister circuits *agree* that the failure to call critical alibi witnesses (like those in Lord), or eyewitnesses (like those in Lord), or witnesses necessary to prove an important fact bearing on guilt or innocence (like those in Lord) will be scrutinized more closely -- and performance

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[9]Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir.), cert. denied, 525 U.S. 981 (1998), is the other decision cited for this point in the cert. petition. Huffington found no error in the failure to investigate *peripheral* witnesses. In the course of this holding, it explicitly cited *nine* decisions from several circuits finding deficient attorney performance for failure to interview alibi witnesses, or eyewitnesses, or witnesses critical to the issue of guilt or innocence. Lord's alibi eyewitnesses clearly fall into these latter categories.

[10]Chambers v. Armontrout, 907 F.2d 825, 828-30 (8th Cir.), cert. denied, 498 U.S. 950 (1990) (failure to interview or call self-defense witnesses deprived defendant of effective assistance); Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986) (failure to investigate and interview available alibi witnesses constituted ineffective trial preparation).

will be found deficient -- where trial counsel fails to interview such witnesses.[11]

3. *The impact of the opinion below is quite limited, because it was a fact-bound decision in a pre-AEDPA case.*

Mr. Lord's first and only petition was filed in district court before the enactment of the AEDPA. The AEDPA's new limitations on the substantive claims that might be asserted on habeas and the deference that must be given to state court decisions are therefore inapplicable here. The impact of the Ninth Circuit's pre-AEDPA Lord decision on future cases is therefore quite limited.

In addition, the claim on which the Ninth Circuit granted relief arose under Strickland. As the decisions cited in the preceding section show, Strickland decisions are especially fact-dependent. The Ninth Circuit's factually unique application of Strickland will thus have limited impact, also.

4. *Petitioners misstate certain facts relevant to this Court's exercise of certiorari jurisdiction.*

No Irrefutable Scientific Evidence of Guilt. The state's petition implies that Mr. Lord's guilt is indisputable because of irrefutable scientific evidence.[12] The state is apparently trying

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[11]E.g., Griffin v. Warden, 970 F.2d 1355, 1358 (4th Cir. 1992) (alibi witnesses); Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991) (alibi witnesses); Chambers v. Armontrout, 907 F.2d 825, 829-32 (self-defense witness); Lawrence v. Armontrout, 900 F.2d 127, 129-30 (8th Cir. 1990) (alibi witnesses); Blackburn v. Foltz, 828 F.2d 1177, 1182-83 (6th Cir. 1987), cert. denied, 485 U.S. 970 (1988) (alibi witness); Code v. Montgomery, 799 F.2d 1481 (alibi witness); Nealy v. Cabana, 764 F.2d 1173, 1177-78 (5th Cir. 1985) (alibi witness).

[12]Petition, p. 2 ("The prosecution presented extensive scientific evidence tying Lord to the murder, including over 100 pieces of trace evidence.").

to convince this Court that the Ninth Circuit's decision was contrary to Strickland because guilt was so certain that any error was harmless.

The state neglects to mention that the validity of the key components of the trace evidence was undermined both during and after the trial by: (1) criminalist Phillips' lies about his tests, his credentials, and the results of his chemical tests at the crime scene; (2) evidence presented at trial contradicting and ultimately causing the state's expert to correct her testimony about whether a hair on a blanket associated with the victim matched one of Lord's hairs; and (3) the fact that no one ever testified that the trace evidence found at the body site "matched" trace evidence found at the purported crime scene, only that such evidence might have a common source. The state's implication that any error was harmless so relief was contrary to Strickland is therefore in error.

The state concludes its summary of the purportedly scientific evidence by stating that "post-trial DNA testing by defense experts was not exculpatory." Petition, p. 3. Critically, however, it was not inculpatory, either; it was inconclusive. Again, the state's attempt to invoke this Court's certiorari jurisdiction by implying that the Ninth Circuit reversed in a case where there is no question about factual guilt is unsupported.

No Detailed Confession to the Murder. The state then refers to "Lord's detailed confession to the murder," Petition, p. 3, in another apparent effort to convince this Court that any trial

errors were harmless. But this too is misleading: Mr. Lord clearly and consistently denied participation in the murder every time he was asked about it by law enforcement, in court, in post-trial depositions, and in any other memorialized setting. The only two people who ever claimed that Lord "confessed" to them were jailhouse informants, presented by the state at trial, with opportunity and motives to lie[13]; their statements about Lord's

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[13]One jailhouse informant was Sonny Belgard. Mary Belgard, his former wife, testified that he had a deal with the prosecutor; Sonny Belgard testified only that he could not remember. Mary Belgard testified that after Sonny was released from jail before the Lord trial, "He said that he had made a deal with the prosecutors.— But I don't know what the deal was. He never said." III-529. Mary Belgard specifically said his "deal" was with prosecutor Danny Clem. Id. Mary received death threats about testifying about her husband's deal. III-540. Sonny testified: "I can't honestly answer [whether there was a deal] that because I don't really think I did. But I don't - I can't remember." III-432. Evidence was also introduced showing that after Sonny was released from jail prior to testifying in the Lord case, he was arrested but never prosecuted for being a felon in possession of a firearm. III-429. His release came earlier than his wife expected it, and she knew quite a bit about the system. III-534. Further, Sonny was on parole when he was in jail for a new charge of burglary, but it was never revoked despite the parole officer's revocation recommendation. III-417, 531. (The district court declined to characterize this arrangement as an undisclosed deal, however. App. 73a.)

The other jailhouse informant was Rex Harvey. He testified at the evidentiary hearing that he was approached by jailer Captain Bertholf and told that he was to be Lord's personal trustee. IV-590. Harvey testified that he was told he should report back anything Lord said about his case. IV-593. Harvey testified that while he was still an inmate, he had meetings with the Prosecutor. IV-597. During these meetings, Harvey would be asked if Lord made statements about his case. IV-598. During the meetings, Harvey was told to continue to report any statements Lord made. IV-599. It was Harvey's understanding the jail wanted Lord to talk about his case. IV-612. It was Harvey's belief that the more information he could get, the better in terms of what the jail staff thought. IV-612. (Harvey declined to characterize this as a deal with the state, though, so the district court found that there was no undisclosed exculpatory evidence in this arrangement. App.

purported confessions were never detailed,[14] but contained only material that was available to the entire population of this rural community because of extensive pre-trial publicity.[15] Thus, any implication that trial errors were harmless (and hence that the case is more worthy of this Court's review) is improper.

No Clouds on Witnesses' Veracity or Unbiased Status. The state then tries to undermine the testimony of the uncalled witnesses, apparently in an attempt to convince this Court that the Ninth Circuit departed from Strickland in ruling that such testimony might have been outcome-determinative; it asserts:

> The fact the teenagers did not see Tracy's family and the scores of volunteers searching for her on Wednesday suggests that, if the sighting occurred at all, it occurred on Tuesday. Even if the sighting did occur on Wednesday, the boys might have seen Tracy's sister, Shannon Parker, who resembled Tracy and who had been searching the area on the date of the alleged sighting.

Petition, p. 5, n. 2.

The facts do not support these criticisms of the young men's testimony. The three young men knew Tracy Parker and went to

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60a).

[14]As the Ninth Circuit stated in full on this point, "Harvey claimed that Lord told him the following: 'I asked her to go cruising around with me at the house I was remodeling, that's where she kept her horse. I hit her in the head with a hammer, raped her in the back of my truck, threw her in a ditch.' According to Harvey, Lord also said he 'got blood on a U-Haul blanket.' Belgard recounted a similar confession with the added detail that Lord had wrapped Tracy's body in a blanket and threw it in the back of the truck before dumping it later on." App. 12a.

[15]Indeed, there was so much pre-trial publicity that a change of venue was granted; the jury was bussed in from out of county. Mr. Lord, however, remained incarcerated at the Kitsap County Jail, at the heart of the newspaper and television broadcasts covering his trial.

school with her. They were available to testify at trial that they saw Parker as they drove in a car together on September 17, 1986. The three witnesses, Robert Huff, Jr., Paul Holden and Gregg Ayres, were first contacted by police just one day later, on Thursday, September 18, 1986 when Parker was considered a missing person -- so the state's effort to convince this Court that the sighting might have been off by a day or two is contradicted by the fact that the boys gave this information to the police within the first 24 hours of Ms. Parker's disappearance.

The state's attempts to characterize the boys' testimony as contradictory and unbelievable is also factually unsupported. Huff told the police in that first report that he saw Parker walking eastbound on Highway 308 towards Keyport from Viking Way on Wednesday (September 17, 1986 was a Wednesday). He identified the clothing she wore and said "he was positive it was Tracy as he saw her full face as they drove by." Ayres was interviewed by police and told them he knew Parker by sight and name. He saw her walking toward Keyport from Viking Way on Wednesday. Holden was interviewed on September 21, 1986. He also stated that he had seen Parker on September 17, 1986. The police report indicates: "I asked him if he was sure on that date and time and he said yes, he was positive."

Each man testified at the evidentiary hearing. Holden strongly endorsed the accuracy of his previous report and his

familiarity with the victim.[16] Ayres did the same. He strongly confirmed his earlier report of seeing Tracy Parker on September 17, 1986.[17] Huff, the third man who saw Tracy Parker on September 17, 1986, also strongly confirmed the date of his previous sighting. Even at the evidentiary hearing in 1997, Huff had no doubt that the girl he saw on September 17, 1986 was Tracy Parker.

Defense investigator Scott O'Neil testified that in 1986, he worked for the law firm that first represented Lord. I-156. He confirmed interviewing Ayres, Holden and Huff in 1986, and giving summaries to former defense counsel.[18]

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[16]Holden, employed at the Puget Sound Naval Shipyard at the time of the habeas evidentiary hearing, was 19 years old in September, 1986, and knew Tracy Parker by sight. He had grown up near her and rode the school bus with her. I-134. He was familiar enough with Tracy and her older sister, Shannon, that he could definitely tell them apart. I-134. In September, 1986, after he learned that Tracy Parker was missing, he contacted the police and reported having seen her on an intersection of Viking Way and Keyport. Holden was with Huff and Ayres. I-136. He was confident that the person he saw was Tracy Parker. I-136. He is also confident that the date he told the police officer at the time was accurate. I-136-37.

[17]He was 29 at the time of the evidentiary hearing and employed as a police officer for the Department of Defense. I-146. In 1986, he was 18 years old. He knew Tracy because she attended the same school as he. I-146. He was also in the same grade. I-147. In September of 1986, he learned that she was missing. I-148. When he heard this, he recalled that he had just seen her on Wednesday, September 17, 1986 at the intersection between Keyport and Bangor. I-149. He spoke with a police officer and reported his sighting of Tracy. Id. He had no uncertainty about the fact that it was Tracy he had seen and no uncertainty about the date he told the police officer. I-150.

[18]In O'Neil's report regarding the interview of Ayres, O'Neil reported there was no drinking or pot smoking by any of the boys on the day they saw Tracy. I-161.

Finally, the suggestion that the boys confused Tracy with her sister Shannon lacks factual support. As the Ninth Circuit indicated, at the time of their initial, pre-trial interviews by both the police and the defense investigators, the boys confirmed that they knew Tracy, knew Shannon, knew the difference between the two, and knew that the person they saw was Tracy. App. 18a-19a. Further, Shannon Parker testified at trial that she was not at that location around that time.

Absolutely No Credibility Determination Made by District Court. Finally, the state attempts to characterize the district court's decision as a credibility determination adverse to the three witnesses, who testified at the habeas evidentiary hearing.[19] Actually, the trial court never made any finding that those witnesses lacked credibility. Its rejection of the ineffectiveness claim was, instead, based on what defense trial counsel *might have believed*: "Defense counsel reasonably *could have found* sufficient discrepancy among the witnesses' various accounts, sufficient uncertainty in their memories and sufficient question about the accuracy of their identification as well as the date on which the event happened to decide not to call them ...." App. 88a-89a

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[19]The petition contends, "the Ninth Circuit gave no deference to the conclusion of the district court judge who actually looked these witnesses in the eye and heard them testify at the evidentiary hearing. In doing so, the Ninth Circuit ignored the district court's implicit findings that the teenagers were not credible." Petition, p. 18, n.7.

(emphasis added).[20] Thus, the district court did not reject the three boys' testimony as lacking in credibility; it speculated about what defense counsel "could have found," and such speculation is not a credibility finding or entitled to deference.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[20]In fact, the district court's decision about what defense counsel "could have" believed was not the reason trial counsel gave: Lord's trial attorney, Ness, acknowledged in his evidentiary hearing testimony that the Huff, Holden and Ayres statements were *consistent* with the defense presented in the case. II-215. He testified, instead, "we did not believe they were accurate. And we were concerned about our credibility with the jury in presenting testimony that might not have been beneficial." II-216.